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No. 83-405

In The

Supreme Court of the United States

October Term, 1983

INDIANA UNIVERSITY FOUNDATION
AND PAULINE WINNICK,
Appellants,

vs.

GEORGE ANDREW REED, MARGARET MOORE,
MARIE SIEDSCHLAG, DOROTHY SCHWAB
AND VIOLA REED SIMISON,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

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OPINION BELOW

This is an appeal from the decision of the Supreme Court of Kansas denying probate in Kansas to a document admitted to probate in the State of Indiana as the will of a decedent resident of the State of Kansas.

JURISDICTION

1. Appellees concede that this court has jurisdiction of the question of the application of full faith and credit under the provisions of 28 U. S. C., Section 1257 (2), but deny that the question of jurisdiction is substantial for the reason that the question of full faith and credit as applied to the facts herein has been explicitly foreclosed by previous decision of the Supreme Court so as to leave no room for a real controversy.

2. Appellees further deny that this court has jurisdiction of this case for the reason that the decision of the Supreme Court of the State of Kansas rests upon adequate state grounds.

3. Appellees further deny that this court has jurisdiction of the question as to the constitutionality of K. S. A. 59-2229 and 59-2230 for the reason that the constitutionality of the statutes has not been before the Supreme Court of the State of Kansas.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are set forth in appellants' Jurisdictional Statement.

STATEMENT OF THE CASE

The material facts are set out in the decision of the Supreme Court of Kansas appearing as Appendix A, page A 1, *et seq.*, of appellants' Jurisdictional Statement, and we will briefly summarize the facts upon which we rely. Sarah R. Reed died near Vassar, Kansas, on June 17, 1978, a resident of the State of Kansas. She had formerly resided in the State of Indiana, and while residing there wrote in her handwriting upon a sheet of stationery bearing her name at the top a document dated June 1, 1973 indicating her wishes ". . . should anything happen to me during the period between now and when I make out a will." The instrument was signed June 2, 1973, by three witnesses (A 3, A 39, 40), but contained no signature in the handwriting of Sarah R. Reed. Following her death a special administrator was appointed who filed a Petition for the Issuance of Letters of Administration alleging that Sarah R. Reed died intestate. Attached to the petition was the document dated June 1, 1973, and contained in the petition were allegations that the document was not a duly executed will but by reason of its content, ". . . Petitioner believes that the Court and the persons named in said instrument should be apprised of the existence of said instrument." An order for hearing was entered and notice was given, and appellant Indiana University Foundation answered denying that decedent died intestate and denying that the document dated June 1, 1973, was not a will. At the hearing on the Petition for Issuance of Letters of Administration held September 29, 1978, both appellants herein appeared by counsel and the court found that Sarah R. Reed died intestate, but that the finding of intestacy was subject to the introduction of any evidence that may

rebut the finding, and that such evidence must be submitted to the court within the statutory period. Letters of Administration were issued and administration of the estate proceeded. Within the nine-month statutory period, appellants herein filed their petition for administration of the document dated June 1, 1973, as the last will and testament of Sarah R. Reed, deceased. A hearing was held on the consolidated petitions on June 12, 1979, (A 4) at which time the court found that the document offered for probate "does not constitute a will pursuant to K. S. A. 59-606 because it is not signed at the end or pursuant to K. S. A. 59-609 because the term 'subscribed' in the proviso of such statute means 'signed at the end', and therefore the petition for probate of will filed by Indiana University Foundation and Pauline Winnick, are dismissed." (A 5). The court's judgment was appealed by Indiana University Foundation and Pauline Winnick, appellants herein, to the Supreme Court of the State of Kansas (Reed I), and upon argument of that appeal, counsel for Indiana University Foundation and Pauline Winnick advised the Supreme Court of Kansas on oral argument that the document dated June 1, 1973, had been admitted to probate in Indiana after the proceedings held below on June 12, 1979. The Supreme Court of Kansas affirmed the judgment of the trial court denying the petitions for probate of the instrument dated June 1, 1973, and holding that the document is not a will under the statutes of Kansas (A 7, 8).

On September 18, 1980, the Monroe Circuit, Court, Monroe County, Indiana, pronounced the document as valid for proper admission to probate in the State of Indiana as the will of Sarah R. Reed, and Letters of

Administration with the will annexed were issued by the Indiana court. On May 8, 1981, Indiana University Foundation filed a Petition For Probate of a Will Probated Elsewhere in the Lyon County, Kansas, District Court. The petition was pursuant to K. S. A. 59-2229 and 59-2230 and stated Sarah R. Reed had been a resident of the State of Kansas at the time of her death. On March 17, 1982, the District Court of Lyon County, Kansas, admitted the handwritten document of Sarah R. Reed to probate pursuant to K. S. A. 59-2230 (A 8). The district court made several conclusions of law among which were that (1) K. S. A. 59-2229 and 59-2230 are not restricted to the wills of nonresidents and (2), that the Indiana proceedings are entitled to full faith and credit, and that the will of Sarah R. Reed is admitted to probate under K. S. A. 59-2230 (A 22, 23). The administrator of the estate of Sarah R. Reed, together with several heirs consisting of the appellees herein, appealed the judgment and decision of the District Court of Lyon County, Kansas, to the Supreme Court of the State of Kansas (Reed II), and following oral arguments, that court on June 10, 1983, entered its opinion reversing the District Court of Lyon County, Kansas (A 2, 20), holding among other things that the full faith and credit provision, Article IV, Section 1, of the Constitution of the United States, does not require recognition of the document in question by the courts of the State of Kansas as the will of a decedent resident of the State of Kansas (A 9, 10). In support of this holding, the court noted that the Indiana court had concluded:

> "The will of Sarah R. Reed is a properly executed ad witnessed will and, therefore, *a valid will qualified for admission to probate in the State of Indiana.*" (Emphasis supplied) (A 11)

The Kansas Supreme Court further held that in order for the doctrine of full faith and credit to apply, the court in which the judgment is entered and on which judgment recognition is sought in another state under the full faith and credit clause of the Constitution of the United States, must have jurisdiction of the subject matter and of the parties, and that Indiana had jurisdiction to (1) admit the instrument for probate as a will in Indiana and (2) jurisdiction to distribute the personal property of Sarah R. Reed within the State of Indiana (A 11, 12). The Kansas Supreme Court went on to find:

> "The Monroe Circuit Court in Indiana neither claimed nor had jurisdiction to determine that the instrument written by Sarah R. Reed was a valid will properly executed according to the laws of the State of Kansas, nor did the Indiana court claim or have jurisdiction to distrbute real or personal property of Sarah R. Reed outside the State of Indiana." (A 14)

The Kansas Supreme Court also based its decision on a second finding to the effect that the provisions of K. S. A. 59-2229 and 59-2230 do not apply to the will of a decedent who was a resident of the State of Kansas on the date of her death. The Court further stated that statutes are procedural statutes to be used in conjunction with K. S. A. 59-806 to prove or admit a foreign will of a nonresident for probate; that a foreign will is the will of a person not domiciled within the state at the time of death and that inasmuch as Sarah R. Reed was a resident of the State of Kansas at the time of her death, the instrument in question could not be considered a foreign will (A 15).

This appeal followed.

ARGUMENT AND AUTHORITIES

From a reading of appellants' Jurisdictional Statement, there are two separate questions on appeal. The first deals with the question of the application or failure to apply full faith and credit by the Kansas Supreme Court to the judgment of the Indiana Court admitting the document in question to probate in Indiana as the last will and testament of decedent, Sarah R. Reed, a resident of the State of Kansas.

The second question presented is more difficult to discern. It involves two Kansas statutes, K. S. A. 59-2229 and 59-2230, which are both admittedly procedural statutes. It would initially appear that appellant's complaint is the interpretation placed upon these statutes by the Kansas Supreme Court when it held that the statutes do not apply to the will of a resident decedent but only to a foreign will of a nonresident of Kansas (A 15). At page 11 of their Jurisdictional Statement, appellants vaguely question the constitutionality of the two statutes in question.

Appellees will, therefore, consider three separate questions:

QUESTION I. Whether full faith and credit is a substantial federal question for the invoking of the jurisdiction of this court.

QUESTION II. Whether this court has jurisdiction to review the decision of the Supreme Court of Kansas when that decision rests upon adequate state grounds.

QUESTION III. Whether this court has jurisdiction to consider whether K. S. A. 59-2229 and 59-2230 are re-

pugnant to the United States Constitution under the existing facts and circumstances.

QUESTION I. Whether full faith and credit is a substantial federal question for invoking of the jurisdiction of this court.

At the time appellants petitioned the Indiana Court for admission of the document dated June 1, 1973, to probate as the will of a nonresident decedent, the District Court of Lyon County, Kansas, the residence of decedent, had already determined that the document did not constitute a will under Kansas law and had denied it probate in Kansas. Following the affirmance of the District Court's decision by the Supreme Court of Kansas in Reed I, appellants petitioned the District Court of Lyon County, Kansas, for admission of the same document to probate based upon the granting of full faith and credit to the Indiana Court's decision. Thus appellants were using full faith and credit as a means of doing indirectly that which they had been unable to do directly. They were attempting to substitute the law of the State of Indiana, which presumably permitted the admission of the document as a will in Indiana for the law of the State of Kansas, decedent's residence. All that the Indiana Court did was to find that the decedent was a resident of Kansas (A 24), that decedent was the owner of an account in the Indiana University Credit Union (A 24, 25); that the will was qualified for admission to probate in Indiana (A 26) and did admit it to probate in Indiana (A 28). The Indiana Court did not find that it was a properly executed will under Kansas laws and did not find that it was admissible to probate in Kansas. Obviously the Indiana Court had no

jurisdiction to do this. The Kansas Supreme Court, in its decision in Reed II, did nothing to disturb the judgment and order of the Indiana Court but it was not bound by it because the Indiana Court neither claimed nor had jurisdiction to make such an order (A 14). It was stated many years ago in *Robertson v. Pickrell,* 109 U. S. 608, 27 L. Ed. 1049 (1883):

> "The Act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several States, does not require that they shall have any greater force and efficacy in other courts than in the courts of the States from which they are taken, but only such faith and credit as by law or usage they have there. Any other rule would be repugnant to all principle and, as we said on a former occasion, would contravene the policy of the provisions of the Constitution and laws of the United States on that subject. *Board of Public Works v. Columbia Coll.,* 17 Wall., 529 (84 U. S., XXI., 691)."

This court further said in that case with regard to the admission of wills where real estate is concerned as summarized in syllabi 2 and 3 thereof:

> "The law of the place governs as to the formalities necessary to the transfer of real property, whether testamentary or *inter vivos.*"

> "The probate of a will of real property in one State is of no force in establishing the validity of the will as to real property in another State. That must be determined by the laws of the State where the property is situated."

The Kansas Supreme Court, having already decided in Reed I that the document dated June 1, 1973, did not constitute a will under the laws of the State of Kansas, and

was therefore not subject to probate, was not required in Reed II to suddenly reverse itself and admit the document to probate in Kansas based on the fact that it had been admitted to probate in Indiana for the limited purpose of passing personal property located in Indiana. This court stated in *State Farm Mutual Automobile Insurance Company v. Duel,* 324 U. S. 154, 89 L. Ed. 812, 65 S. Ct. 573 (1945), Reh den 324 U. S. 887, 89 L. Ed. 1436, 65 S. Ct. 856 (1945):

> "The full faith and credit clause of the Federal Constitution may not be used to compel one state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate."

A somewhat similar issue was considered by this court in *Underwriters National Assurance Company v. North Carolina Life and Accident and Health Insurance Guaranty Association, et al.,* 455 U. S. 691, 71 L. Ed. 2d 558, 102 S. Ct. 1357 (1982), where it was stated in Headnote No. 2:

> "Under full faith and credit principles, a judgment of a court in one state is conclusive upon the merits in a court in another state *only if the court in the first state had power to pass on the merits, that is that it had jurisdiction to render the judgment;* thus, before a court is bound by the judgment rendered in another state, it may inquire into the jurisdictional basis of the foreign court's decree, and if that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given." (Emphasis supplied.)

When appellants filed their second petition in the District Court of Lyon County, Kansas, on May 8, 1981, Petition for Probate of a Will Admitted Elsewhere, the Su-

preme Court of Kansas had already denied the document in question admission to probate based on Kansas law (Reed I). This court stated in *Pacific Employers Insurance Company v. Industrial Accident Commission*, 306 U. S. 493, 501, 83 L. Ed. 940, 59 S. Ct. 629 (1939):

> "While the purpose of that provision was to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in other states, the very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. As was pointed out in *Alaska Packers Assn. v. Industrial Accident Comm'n.*, 294 U. S. 547, 79 L. Ed. 1052, 55 S. Ct. 518 (1935): 'A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, whenever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own.'"

The Supreme Court went on to say in *Pacific*:

> "It has often been recognized by this court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgments of another state in contravention of its own statutes or policies. . . . And in the case of statutes, the extrastate effect of which congress has not prescribed, as it may under the constitutional provision, we think the conclusion is unavoidable that *the full faith and credit clause does not require one state to substitute for its own statute applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state*

of its enactment with respect to the same persons and events." (Emphasis supplied.)

From the foregoing cases, it is obvious that the Supreme Court of the United States has ruled on the question of full faith and credit as it applies to facts similar to the present case so as to leave no room for controversy and the question as to the application of full faith and credit in this case is not substantial.

QUESTION II: Whether this court has jurisdiction to review the decision of the Supreme Court of Kansas when that decision rests upon adequate state grounds.

The basis of the Kansas Supreme Court's decision as previously noted was twofold; the first was that full faith and credit need not be applied to the Indiana decision (A 10) and the second that the statutes upon which both appellants relied in their Petition For Probate of Will Probated Elsewhere (K. S. A. 59-2229 and 59-2230) applied only to foreign wills, the wills of nonresident decedents, and not to the wills of resident decedents (A 15). The second holding or decision is a state ground or nonfederal ground.

It is well established that this court will not review a decision of a state court resting upon adequate and independent nonfederal ground. ***Bell v. Maryland,*** 378 U. S. 226, 12 L. Ed. 2d 822, 84 S. Ct. 1814 (1964); ***Smith v. Smith,*** 366 U. S. 210, 6 L. Ed. 2d 233, 81 S. Ct. 1050 (1961); ***Radio Station WOW, Inc. v. Johnson,*** 326 U. S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475, 32A Am. Jur. 2d 167, Sec. 670 (1945). It is granted that the statutes in question are procedural and not substantive in nature but an adequate state ground may be based upon procedural grounds as well as substan-

tive. Annotation, Adequate State Ground, 24 L. Ed. 2d 837, 840. The second question before the Kansas Supreme Court was whether the statutes in question, K. S. A. 59-2229 and 59-2230, applied to the wills of residents of Kansas or only to the will of nonresidents, foreign wills. The Kansas Court held the latter. This second decision involved the interpretation of two Kansas statutes and did not involve a federal question. A state's highest court is the final judicial arbiter of the meaning of state statutes, *Gurley v. Rhoden*, 421 U. S. 200, 44 L. Ed. 2d 110, 95 S. Ct. 1605 (1975); *Alabama v. King & Boozer*, 314 U. S. at 9-10, 86 L. Ed. 3, 62 S. Ct. 43, 140 A. L. R. 615 (1941). The decision of the state court did not preclude the offering of the document dated June 1, 1973, as a will of a resident decedent. In fact, appellants had already petitioned the Kansas courts for probate of the document as the will of a resident decedent. The Kansas Supreme Court's decision in Reed II held only that the statutes upon which appellants based their second petition applied to the wills of nonresident decedents. Thus there was no attempt on the part of the Kansas Supreme Court to prohibit appellants from offering the document to probate in Kansas but only a decision that they could not do so under the two statutes upon which they were relying. Appellants have been deprived of no basic constitutional right. Kansas has jurisdiction of the proceeding for the probate of the wills of her citizens and the Kansas legislature has the duty to pass laws to implement the probate procedure. The Supreme Court of Kansas has the duty and exclusive jurisdiction to interpret those laws. So long as appellants were not denied the right to petition the courts of Kansas for admission of the document dated June 1, 1973, to pro-

bate in Kansas, they have been denied no federally protected right. The appellants did petition directly for such probate which was denied on valid grounds and appellants did not appeal that decision referred to herein as Reed I.

It is submitted that the decision of the Supreme Court of Kansas was based on adequate state ground completely independent of the federal question of full faith and credit.

QUESTION III. Whether this court has jurisdiction to consider whether K.S.A. 59-2229 and 59-2230 are repugnant to the United States Constitution under the existing facts and circumstances.

It is not clear from a reading of appellants' Jurisdictional Statement as to whether or not they now question the constitutionality of K. S. A. 59-2229 and 59-2230. If they are, this is the first time and place they have done so. They originally petitioned the District Court of Lyon County, Kansas, for probate of will probated elsewhere based upon and pursuant to either or both of those statutes (A 33, 35, 22, 23). At no time did they raise the question of constitutionality before the Supreme Court of Kansas. If appellants are challenging these statutes as unconstitutional under the federal constitution the issue must have been presented to the Supreme Court of Kansas before the issue may be raised in this court. *McGoldrick v. Compagnie Generale Transatlantique,* 309 U. S. 430, 84 L. Ed. 849, 60 S. Ct. 670 (1940). If this is not done, and it was not, there is no federal question concerning the constitutionality of the statutes.

CONCLUSION

The decision of the Kansas Supreme Court on the question of full faith and credit is in full accord with previous decisions of this court and no substantial federal question is presented by the appeal of appellants.

The Kansas Supreme Court's decision regarding K. S. A. 59-2229 and 59-2230 involves only the interpretation of two procedural statutes and no federal question was presented in the interpretation nor is one presented as a result of the interpretation. This decision is based solely on a state ground and is sufficient to dispose of the case thus precluding review by this court.

The question, if any, as to whether K. S. A. 59-2229 and 59-2230 are repugnant to the Constitution of the United States, having never been presented to the Kansas Supreme Court, may not now be considered.

Appellees respectfully move this court to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of Kansas.

Respectfully submitted,

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